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Moral Rights: The Economic Ramifications of Moral Rights Under VARA in the U.S.

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Moral Rights:

The economic ramifications of moral rights under VARA in the U.S.

By: Akilah Chandler

A thesis submitted in conformity
with the requirements for the
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*Moral Rights:
The economic ramifications of moral rights under VARA in the U.S.*

By: Akilah Chandler

Abstract: When balancing the interests of the art market gatekeepers including patrons, dealers, and auction house intermediaries, with the interest of artists, artists have always bared the shorter end of the stick. It has been almost 30 years since the U.S. legal system acknowledged moral rights and a lifetime that artist have had to defend those rights. However, the question remains—how has the art market balanced these conflicting interests and at what expense? This paper will explore the effects moral rights have on an artist's market and with that, the overall art market. This paper will also cover the ramifications following subsequent disavowal of works deemed prejudicial to the artist's reputation while exploring the life of a work after it has been removed from art market circulation. The Visual Artist Rights Act (VARA), will be applied in this paper and likened to the doctrine of laches, that is, it will be investigated in terms of artists who are vigilant on exercising their moral rights under VARA in the U.S. and artists who slumber on those rights. This dynamic will be juxtaposed with occurrences that predate VARA to highlight the ramifications of protecting moral rights and the consequences of its absence.

TABLE OF CONTENTS

List of Illustrations	ii
Introduction	1
Part One: Before VARA	4
Chapter One: Missing the Mark	5
Moral Rights	5
Artists Reserved Rights Transfer and Sale Agreement.....	7
Chapter 2: Exercising Moral Rights Pre-VARA	12
Diego Rivera’s Rockefeller Mural.....	12
Studying Rivera’s Market	16
Richard Serra’s <i>Titled Arc</i>	17
Studying Serra’s Market	19
Donald Judd’s Unauthorized Copies	20
Studying Judd’s Market	25
Part Two: After VARA	29
Chapter Three: Exercising Moral Rights Post-VARA	30
Cady Noland, <i>Cowboys Milking</i>	30
Cady Noland, <i>Log Cabin Façade</i>	33
Studying Noland’s Market.....	35
Richard Prince Disavows Portrait.....	38
Richard Prince at It Again.....	39
Studying Prince’s Market	39
Chapter 4: Best Professional Practices	42
Preventative Measures Before Leaving the Studio.....	42
Dealing with Artists’ Moral Rights.....	42
Integrating Damaged and Disavowed Works Back into the Market	44
Appendix	51
Bibliography	57

LIST OF ILLUSTRATIONS

Figure 1. Robert Projansky and Seth Siegel, *Artists Reserved Rights Transfer and Sale Agreement*, courtesy II.13 The Museum of Modern Art Archives, New York.

Figure 2. Diego Rivera, *Man at the Crossroads*, 1932; © 2018 Banco de México Diego Rivera Frida Kahlo Museums Trust, Mexico, D.F. / Artists Rights Society (ARS), New York, <https://www.moma.org/collection/works/34635>

Figure 3. Diego Rivera, *Man at the Crossroads*, (in progress), mural, Rockefeller Center, New York, 1932-34; The figure of Lenin is visible in the center right. © Banco De Mexico, Diego Rivera and Frida Kahlo Museums Trust, Av. Cinco de Mayo No. 2, Col. Centro, Del. Cuauhtemoc, 06059, Mexico, D.F. Courtesy del Instituto Nacional de Bellas Artes y Literatura, Mexico Photo Courtesy Old Stage Studios, Gualala, CA.

Figure 4. Diego Rivera, *Man, Controller of the Universe*, recreated version, which is on display at the Palacio de Bellas Artes in Mexico City. Courtesy of www.DiegoRivera.org

Figure 5. Richard Serra, *Titled Arc I*, 1981; View of Federal Plaza with *Tilted Arc* seen from the side, photograph by Susan Swider, courtesy of artist

Figure 6. Cady Noland, “Cowboys Milking”, 1990, courtesy artnet.com

Figure 7. Formerly Cady Noland, *Log Cabin*, 1990 - DISAVOWED, courtesy PACER

Figure 8. Formerly Cady Noland, *Log Cabin Blank with Screw Eyes and Cafe Door* – DISAVOWED, courtesy Stonescape.us.

Figure 9. *Affidavit of Plaintiff, Cady Noland in Opposition to Defendants' Motion to Dismiss*. no. 1:17-cv-05452-JPO, (SDNY) 3 Aug. 2018. *Exhibit B*. https://greg.org/wp-content/uploads/2018/09/noland_log_cabin_artist_affidavit_79B.pdf.

Figure 10. Ivanka Trump with DISAVOWED Richard Prince portrait, courtesy (@ivankatrump/Instagram)

INTRODUCTION

Background and Need

Until the enactment of the 1990 Visual Artists Rights Act (VARA), artists were afforded little to no rights in the United States to protect their works from misattribution and harm. Before its codification in U.S. law, artists relied on the good faith of a handshake or contract to honor their moral rights. Unfortunately, these handshakes and contracts yielded broken promises and unmet guarantees opening the floodgates to opportunistic perpetrators and a slew of legal suits. It took the limitations of a document, like the Artist's Reserved Rights Transfer and Sale Agreement (ARRTSA), for artists to claim economic and non-economic rights that were unaddressed in U.S. legislation at the time.¹ Almost 20 years after the adoption of AARTSA, the U.S. did the bare minimum to implement legislation and did so in the form of a negligible *moral rights* clause. The shortcomings of this clause came at the expense of an already exploited class of professionals – artists.

Statement of the Problem

The constricted scope of VARA's application in the U.S. has been interpreted through various cases, legislative bodies, and periodicals. For this reason, VARA will not be analyzed exclusively for its limitations. Instead, it will delve into the economic ramifications on the art market when moral rights are at stake. Further exploration will reveal the implications following artists subsequent disavowal of works due to acts which would be "prejudicial to the artist's reputation"² and the ensuing effects on those artists' markets.

The U.S. has a poor track record of honoring moral rights and has yet to put a dent in efforts aimed at ameliorating decades worth of shortcomings. On the other hand, strides have been made

¹ Haafte-Schick, Lauren Van. "Conceptualizing Artists' Rights." *Oxford Handbooks Online*, 2018, doi:10.1093/oxfordhb/9780199935352.013.27.

² 17 U.S. Code Section 106A

by artists to challenge the underlying commercial purpose conferred by the Constitution, "to promote the Progress of Science and the useful Arts." Put succinctly, moral rights afford artists the right to disavow their works rendering its commercial value zero, but why is this and how does this affect the artist's market? Further, what becomes of the works themselves and how does this affect the general art market?

Methodology

Two main parts divide this paper, the art market before VARA's enactment and the art market after VARA's enactment. Part One: *Before VARA*, is broken down into two chapters. These chapters cover efforts made by artists in the absence of moral rights to harness public dissension and assert legal theories to defend the honor of their works. Part II: *After VARA* continues to the empirical heart of this paper covering two artists as case studies and following up with the best professional practices for dealing with moral rights.

Chapter 1 introduces the U.S.'s resistance to the adoption of moral rights. It then goes on to cover the efforts of AARTSA in combating the U.S.'s minimalist approach in complying its then legislation with the moral rights requirements of Berne. Chapter 2 details three case studies where despite the efforts made to combat the absence of moral rights, failed to curtail "works of visual art" being overlooked as extensions of the artists. All case studies in this section predate the codification of VARA and will be interpreted for the consequences of VARA's absence.

Part II: *After VARA* opens with the infamous cases of artists Cady Noland and Richard Prince exercising their moral rights in the 21st century (Chapter 3). This chapter includes case briefs and an analysis of how their controversial tactics affected each of their markets. Chapter 4 consists of insight extrapolated from interviews with industry experts from an art advisory firm, insurance firm, and a conservation studio. From this insight, the best practices for dealing with moral rights and integrating damaged and disavowed works back into the market will take the form of a

manual. In each of the case studies in parts one and two, the metrics used to analyze the viability of an artist's market include:

- Sales activities (private and. auction³)
- Gallery representation
- Showcasing at Biennials
- Solo v. Group shows
- Museum acquisitions
- Commissions
- Press coverage

³ Works sold solely in the U.S.

**PART ONE
BEFORE VARA**

CHAPTER ONE MISSING THE MARK

Moral Rights

The origins of *moral rights* lie in the notion that an artist injects her spirit into the art.⁴ Consequently, the work is regarded as an extension of the artist thus falling under the protection of a human right.⁵ For over 100 years, the United States refused to enact moral rights legislation nor become a signatory to the leading international copyright treaty—the Berne Convention for the Protection of Literary and Artistic Works.⁶ The resistance to accede attributed to Article 6 *bis* of the Berne Convention.⁷ This Article mandated member countries to recognize and protect *droit moral*,⁸ specifically the right of attribution and integrity.⁹ The first prong, the right of attribution, recognizes that an author may be associated by name to her work and may remove her name from works created by another.¹⁰ Under the second prong, the right of integrity, an author may object to any modification, distortion, or destruction of her work that may adversely affect her honor or reputation.¹¹

The late adoption of moral rights in the U.S. had to do with its reluctance to attach non-economic rights to property that did not belong to the “traditional” property owner. Conventionally, property rights pass upon the physical possession of the property. Once the property is transferred, the accompanying rights and duties associated with it transfer as well. In the case of a work of visual art, moral rights are retained by the artist regardless of who owns the

⁴ Carter v. Helmsley-Spear, Inc., 71 F.3d 77, 81 (2d Cir. 1995) (citing Ralph E. Lerner and Judith Bresler, *Art Law: The Guide for Collectors, Investors, Dealers, & Artists* (2012))

⁵ McClean, Daniel, and Christina Michael's. “Murdering Art: Destruction of Art Works and Artists' Moral Rights.” *The Trials of Art*, Ridinghouse, 2008, pp. 173–193.

⁶ “Berne Convention for the Protection of Literary and Artistic Works.” *World Intellectual Property Organization*, WIPO, www.wipo.int/treaties/en/text.jsp?file_id=283698. [hereinafter Berne Conv.]

⁷ *Ibid.* at art. 6*bis*/

⁸ The French singular term *droit moral* connotes an indivisible package of rights, as distinguished from the plural ‘moral rights,’ reflective of the current American concept of divisibility.” 3 Melville B. Nimmer and David Nimmer, *Nimmer on Copyright § 8D.01 [A] n. 4* (2010).

⁹ Bresler, Judith. “Moral Rights.” *Art Law: The Guide for Collectors, Investors, Dealers, & Artists*, edited by Ralph E Lerner, 4th ed., vol. 2, Practising Law Institute, 2012.

¹⁰ 17 U.S.C. § 106A(a)(a).

¹¹ *Ibid.* § 106A(a)(2)(3)

work, including the copyright.¹² In essence, it was *moral rights* itself that deterred the U.S. from acceding to the Convention. It took the exploitation of the moral rights of renowned artist Richard Serra, further discussed in Chapter Two, to realize how negligible the moral rights clause was. In December of 1990, the revisited moral rights clause was modified as an amendment to the Copyright Act of 1976. This amendment enacted into law a limited piece of moral rights federal legislation known as the Visual Artist’s Right Act (VARA).

Under VARA, moral rights are non-transferrable and are exercisable only by the artist.¹³ The rights last for the duration of the artist’s life,¹⁴ or in the case of joint works, through the life of the last surviving artist.¹⁵ VARA grants attribution and integrity protections to authors of a “work of visual art”¹⁶. These works of visual art include ¹⁷

- Paintings
- Drawings
- Prints, lithographs, etc.
- Sculptures
- Still photographic images produced for exhibition purposes.

Each of these works must exist in a single copy or in a limited edition of no more than 200 copies that are signed and consecutively numbered by the artist or bare an identifying mark.¹⁸

¹² Thurston, Natalia. “Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act.” *Berkeley Technology Law Journal*, vol. 20, no. 1, Jan. 2005, pp. 701–721., doi:<https://doi.org/10.15779/Z38097B>.

¹³ 17 U.S.C § 106A(a)(2018).

¹⁴ 17 U.S.C. § 106A(d)(1)(2018).

¹⁵ Ibid. § 106(A)(d)(3)(2018).

¹⁶ Ibid. § 101 (2018)

¹⁷ Ibid.

¹⁸ Ibid.

VARA does not protect advertising, promotional, or utilitarian works. It also does not protect works for hire regardless of their artistic merit, their medium, or their value to the artist or the market.¹⁹

Artists Reserved Rights Transfer and Sale Agreement

Before the enactment of VARA, the claims filed by artists to protect their works ranged from First Amendment to copyright infringement claims. These claims suggest that the only method artists used to protect their moral rights was to either stipulate it in a contract or piece together claims from various bodies of law. This chapter will focus on the contractual component of artists' claims before the enactment of VARA; specifically, the Artists Reserved Rights Transfer and Sale Agreement. (See Figure 1) This agreement has been dubbed AARTSA, the Artist's Contract, the Original Transfer Agreement, the Projansky Agreement, and the Siegelaub Agreement.²⁰ Regarding this paper, *AARTSA* and the *Agreement* are used interchangeably.

The Agreement was drafted in 1971 by exhibition organizer and dealer of Conceptual art, Seth Siegelaub, and New York lawyer Robert Projansky.²¹ AARTSA was intended to be the standard contract used when a work sold, or title transferred. It provided a tool through which artists could control the terms concerning the use and sale of their artwork, and a means through which they could claim rights not addressed in U.S. law at the time. Sales agreements and certificates of authenticity and ownership have typically accompanied art transactions since the Renaissance. However, historically, it has been unusual for artists to compose the terms of those documents.²² Though the contract is utilized in private transactions and not sanctioned in public

¹⁹ Bresler, Judith. "Moral Rights." *Art Law: The Guide for Collectors, Investors, Dealers, & Artists*, edited by Ralph E. Lerner, 4th ed., vol. 2, Practising Law Institute, 2012.

²⁰ Haaften-Schick, Lauren Van. "Conceptualizing Artists' Rights." *Oxford Handbooks Online*, 2018, doi:10.1093/oxfordhb/9780199935352.013.27.

²¹ Seth Siegelaub Papers. Gift of Seth Siegelaub and the Stichting Egress Foundation, Amsterdam, II.13. The Museum of Modern Art Archives, New York. [hereinafter Siegelaub, II.13. MoMA Archives, NY].

²² Haaften-Schick, Lauren Van. "Conceptualizing Artists' Rights." *Oxford Handbooks Online*, 2018, doi:10.1093/oxfordhb/9780199935352.013.27.

law, its traces of rights to integrity has proven to be more expansive than a creative interpretation or application of VARA.

“The agreement [was] designed to remedy some generally acknowledged inequities in the art world, particularly artists' lack of control over the use of their work and participation in its economics after they no longer own it.²³ At its initial conception, a draft was sent to 500 people in the international art community for their insight. Siegelaub distributed questionnaires to various artists to solicit their feedback about the effectiveness and usefulness of the Agreement. The feedback was overwhelmingly positive. On question five of the questionnaire where it asks, “may we say publicly that you endorse the use of this Agreement?”²⁴ artists including Ed Ruscha and Sol Le Witt checked off yes as their response. As evidenced by Sol Le Witt’s support, in an addendum he adds, “how about getting some collector who likes this idea to buy you some space in the art magazines to advertise this? I imagine that most artists will only use this agreement form [regarding] larger more explorative works. (small drawings, etc. are easily misplaced & forgotten)”.²⁵

For such an early stand-in to integrity rights, the Agreement commanded a straightforward procedure to keep it in effect with each successive owner of the work of art. It required “the artist and the first-time owner of the work to fill out and sign the Agreement to affix a notice of its existence somewhere on the work of art itself.”²⁶ This Agreement also specified that “when one disposes of the work in any manner, [she] must pay to the artist (or through the dealer if the artist has one) 15% of the increase between the price or value of the work when [she] got it and the price or value when [she] transfers it; if there is no increase,

²³ "Seth Siegelaub Papers. Gift of Seth Siegelaub and the Stichting Egress Foundation, Amsterdam, II.13. The Museum of Modern Art Archives, New York.

²⁴ Ibid.

²⁵ Siegelaub, II.13. MoMA Archives, NY

²⁶ Ibid.

nothing need be paid.”²⁷ In other words, “ARRTSA grants an artist control over where works can be shown, information on who owns the piece, and provides the artist with 15% of the proceeds of any resale.”²⁸ Article 10 of the Agreement goes as far to say, “Collector covenants that in the event of any damage to the work, the collector shall consult with artist [before] the commencement of any repairs or restoration and if practicable, the artist [will have] the opportunity to make any required repairs or restoration.”²⁹ This specified protocol of consulting the living artist in the event of *any* damage to the work patterns current practices put in place today, and if astutely enforced, could have offset many of the case studies elaborated further in this paper. The intended efforts of the Agreement are applaudable, but as measured against practicality, many have deemed it an abject failure. While its efforts were endorsed and heavily advertised, only a few artists—most notably Hans Haacke—were willing to use the contract throughout their career, requiring it for all sales of their works.

Fear of losing sales, the burden of negotiating and enforcing the contract, and ambivalence about getting involved with the art market discouraged a critical mass of support for the Agreement.³⁰ As noted in the drafts of the Agreement, “It should be obvious that the more strings the artist attaches to the work, the more difficult it will be to sell and re-sell it. We have included it mostly to give the parties a place to begin their bargaining about the artist’s control over the exhibition of [her] works.”³¹ “We realize that this Agreement is essentially unprecedented in the art world and that it just may cause a little rumbling and trembling; on the other hand, the ills it remedies are universally acknowledged to exist, and no other practical way

²⁷ Ibid.

²⁸ Kaplan, Isaac. “Do Artists Have the Right to Disown Their Work?” *Artsy*, 21 June 2016, www.artsy.net/article/artsy-editorial-do-artists-have-the-right-to-disown-their-work.

²⁹ Siegelau, II.13. MoMA Archives, NY

³⁰ Kim, Kibum. “Could a Long-Forgotten Contract Settle the Artist Resale Royalties Debate?” *Hyperallergic*, 9 Jan. 2015, hyperallergic.com/172688/could-a-long-forgotten-contract-settle-the-resale-royalties-debate/?wt=2.

³¹ Siegelau, II.13. MoMA Archives, NY

has ever been devised to cure them...this is a substitute for what has existed before—nothing"—
Signed "Seth Siegelaub, 24 February 1971."³²

Affirmative signs of the Agreement's "unprecedented" efforts came full cycle when in 2011, an exhibition dedicated to validating the authorship and originality of works provided examples of artist's certificates for the past 50 years.³³ Curated by Cornelia Lauf and Susan Hapgood, *In Deed: Certificates of Authenticity in Art*, was held in Vleeshal Zusterstraat and invited special guests Seth Siegelaub and international art lawyer, curator, and author, Daniel McClean to discuss the "legal and ontological ramifications" of certificates. This exhibition traveled to the Netherlands, Venice, New Delhi, Mumbai, Rome, Chicago, and Istanbul, eventually making its way to New York's The Drawing Center as its last stop.³⁴ In November of 2014, Maxwell Graham used the Agreement in a group show at his Essex Street Gallery.³⁵ In his *Artist's Contract* Exhibition, all the works were available for sale and accompanied with the Agreement requiring collectors' signatures upon purchase.

The idea of giving artists control over their work is in no way new but expressing this idea in a tangible form and breaking down the best practices for leveraging power imbalances has ignited conversations and legal cases in ways not even Projansky and Siegelaub saw coming. In his first draft, Siegelaub wrote to artists, reminding them, "There is no art without you"³⁶ and with that, it would seem in the best interest of the art market to put artist's rights first. The passage continues as a manifesto, laying out the foundation for the *Agreement and with that*

³² Ibid.

³³ "In Deed: Certificates of Authenticity in Art." *Past Exhibitions*, Vleeshal Zusterstraat, 2011, vleeshal.nl/en/exhibitions/in-deed-certificates-of-authenticity-in-art.

³⁴ "In Deed: Certificates of Authenticity in Art November 3–December 9, 2012." *The Drawing Center: Past Exhibitions*, 2012, www.drawingcenter.org/en/drawingcenter/5/exhibitions/14/past/112/in-deed/.

³⁵ Asfour, Nana. "Essex Street Presents Siegelaub's 'Artist's Contract' Exhibition." *ARTnews*, 28 Jan. 2015, www.artnews.com/2014/11/10/seth-siegelaub-artist-contract-at-essex-street/.

³⁶ Siegelaub, II.13. MoMA Archives, NY

contractual claims not afforded during this time. Unfortunately, while this sentiment and contractual component curbed the ongoing oversight of artist's moral rights, it fell short of eradicating ill-fated handshakes, dishonored oral contracts, and of course—unrecognized moral rights in legislation.

CHAPTER 2 EXERCISING MORAL RIGHTS PRE – VARA

Despite the efforts put forth by AARTSA along with comparable agreements put out since then, these documents fell short of curving major litigious suits. As mentioned before, the alternative defense to protecting rights of integrity pre-VARA was asserting rights from various bodies of law including copyright, constitutional, and trademark law. This chapter will provide a synopsis on renown case studies where these bundles of rights have been asserted as claims of defense in place of codified moral rights. These cases include Diego Rivera’s dismantled fresco at Rockefeller Center and Richard Serra’s controversial *Titled Arc* (1981). This chapter will also cover a case in which the ambiguity and lack of codified legislation on artist's moral rights were taken advantage of as seen in the case of artist Donald Judd and art dealer Giuseppe Panza di Biumo. These cases will then be explored regarding the effect on the artists’ market.

Diego Rivera’s Rockefeller Mural

In his memoirs, David Rockefeller writes that Abby and Nelson Rockefeller argued to award the 1933 Rockefeller Center mural commission to Mexican painter and muralist, Diego Rivera (1886-1957).³⁷ John D. Rockefeller Jr. seemed less in favor of this decision and sought to add Henri Matisse or Pablo.³⁸ When neither were available, Rivera was chosen. Devised by a committee of Rockefeller Center advisors and Nelson himself, Rivera was given the theme: “Man at the crossroads looking with hope and high vision to the choosing of a new and better future.”³⁹ His work would occupy an ideal location, the ground-floor elevator bank in the Great Hall. Rivera submitted several drawings for approval before starting work. In the design given to both Abby and Nelson, Rivera offered an allegory between the competing social systems of

³⁷ Dickerman, Leah, et al. *Diego Rivera - Murals for the Museum of Modern Art: The Museum of Modern Art*, 2011.

³⁸ *Ibid.*

³⁹ *Ibid.*

Capitalism and Socialism.⁴⁰ (See Figure 2) Rivera created an elaborate theme for his three walls: *The Frontier of Ethical Evolution* on the left, *Man at the Crossroads*, in the center, and *The Frontier of Material Development* on the right.⁴¹ Susana Pliego, exhibition co-curator of the Mexican Cultural Institute's, *Man at the Crossroads: Diego Rivera's Mural at Rockefeller Center*, says "the original sketch for the mural — and what Rivera agreed to paint — included three men clasping hands in the middle: a soldier, a worker, and peasant. The threesome comprised a union of the three elements Rivera considered humanity was composed of."⁴² "Unfortunately, what he painted was different from the sketch," David Rockefeller Sr. told the Museum of Modern Art in 2012.⁴³

However, during the execution of the work, which began in late March of 1933, a radicalization occurred. The mural turned into "a Socialist onslaught against capitalism in a citadel of capitalism."⁴⁴ (See Figure 3). The realized mural, titled *Man at the Crossroads*, depicted in the center, a worker operating machinery before a giant hand holding an orb of cells and microbes. From this scene emerges a pair of propeller wings Rivera describes as "elongated ellipses"⁴⁵ of exploding suns and microorganisms which praise discoveries made possible by scientific advancement. Surrounding this scene were depictions of Soviet Leader Vladimir Lenin holding hands with a group of multi-racial workers. To the right of Lenin, in the upper right corner, a Russian May Day rally with red flags. Nelson Rockefeller requested that Rivera substitute Lenin's face with that "of some unknown man."⁴⁶ With his Communist credentials on

⁴⁰ Gallery label from *Diego Rivera: Murals for The Museum of Modern Art*, November 13, 2011. May 14, 2012.

⁴¹ Gamboni, Dario. *Destruction of Art: Iconoclasm and Vandalism since the French Revolution*. Reaction Books, 1997.

⁴² Keyes, Allison. "Destroyed by Rockefellers, Mural Trespassed On Political Vision." *NPR*, NPR, 9 Mar. 2014, www.npr.org/2014/03/09/287745199/destroyed-by-rockefellers-mural-trespassed-on-political-vision.

⁴³ Ibid.

⁴⁴ "Gamboni, Dario. *Destruction of Art: Iconoclasm and Vandalism since the French Revolution*. Reaction Books, 1997.

⁴⁵ Ibid.

⁴⁶ Gamboni, Dario. *Destruction of Art: Iconoclasm and Vandalism since the French Revolution*. Reaction Books, 1997.

the line, Rivera refused. The media speculated it was Communist propaganda.⁴⁷ Facing backlash, the Rockefeller's asked Rivera to remove the face of Lenin, but he refused. Rivera offered to balance the work with a portrait of Abraham Lincoln on the opposing side.⁴⁸

On May 4, 1933, Rivera sent the Directors of the Rockefeller Center a letter in which he said, "rather than mutilate the conception, I should prefer the physical destruction of the conception in its entirety."⁴⁹ He was paid the contracted fee of \$21,000 and ordered to cease work. Anticipating its destruction, Rivera asked his assistant, Lucienne Bloch, to take photographs of the mural. Bloch hid a camera under her jacket a few days before events came to a head and documented the unfinished mural for posterity. On May 9, 1933, Rivera was dismissed from the Rockefeller Center project. He was escorted from the building, and the mural was covered over with canvas. Nelson suggested that it be donated to the Museum of Modern Art, but the museum trustees refused the offer.⁵⁰ Despite these negotiations and demonstrations organized by Rivera's supporters, on February 10-11, 1934, the mural was chiseled from the lobby wall by workmen and taken away in wheelbarrows. When it became known that the work was destroyed, the Rockefellers were subject to public outcry and accused of cultural vandalism. In response, Rivera claimed, "there ought to be...a justice that prevents the assassination of human creation as of human character."⁵¹

There is reason to believe, however, that the ultimate catalyst provoking Rivera's dismissal and destruction of his work was not the image of Lenin, but something closer to home. On the left side of the mural, among the group of men drinking cocktails with women was the

⁴⁷ Dickerman, Leah, et al. *Diego Rivera - Murals for the Museum of Modern Art*: The Museum of Modern Art, 2011.

⁴⁸ Ibid.

⁴⁹ Gamboni, Dario. *Destruction of Art: Iconoclasm and Vandalism since the French Revolution*. Reaction Books, 1997.

⁵⁰ Dickerman, Leah, et al. *Diego Rivera - Murals for the Museum of Modern Art*: The Museum of Modern Art, 2011.

⁵¹ McClean, Daniel, and Christina Michael's. "Murdering Art: Destruction of Art Works and Artists' Moral Rights." *The Trials of Art*, Ridinghouse, 2008, pp. 173–193.

alleged recognizable face of John D. Rockefeller Jr.⁵² The alcoholic drinks may have served as a reference to the Rockefellers' role in Prohibition, which went in effect in 1920, a year after the U.S. Constitution was amended to prohibit the sale and distribution of alcohol. That amendment was repealed to great celebration in 1933 while the Rockefeller Center mural was underway. The Rockefeller family had been major financial supporters of the Anti-Saloon League, a key force in enacting Prohibition laws⁵³ - John D. Rockefeller Jr. took the temperance pledge at the age of ten himself. Additionally, reporter, Joseph Lilly interpreted Rivera's pictures of microbes in the ellipses above the scene as "germs of infectious and hereditary social diseases [...] so placed as to indicate them as the results of a civilization revolving around nightclubs,"⁵⁴ thus linking them to sexual licentiousness.

Only black-and-white photographs exist of the original incomplete mural. After the removal, Rivera submitted a request to the Mexican government for a site to re-create the work. He was offered a commission and a wall at the Palacio de Bellas Artes in Mexico City, a newly completed cultural venue for theater, music, and art intended to help fulfill the nation's post-revolutionary program.⁵⁵ Rivera repainted the mural on a smaller scale and with additional motifs. It was renamed *Man, Controller of the Universe*. The new version included a portrait of Leon Trotsky, Karl Marx, Friedrich Engels, Charles Darwin, and John D. Rockefeller, Jr., seen drinking in a nightclub with a woman; above their heads, a dish of syphilis bacteria.⁵⁶ (See Figure 4)

⁵² Dickerman, Leah, et al. *Diego Rivera - Murals for the Museum of Modern Art*: The Museum of Modern Art, 2011.

⁵³ Burns, Ken. "The Roots of Prohibition." PBS. <http://www.pbs.org/kenburns/prohibition/roots-of-prohibition/>

⁵⁴ "Diego Rivera and the Left - The Destruction and Recreation of the Rockefeller Center Mural." *Scribd*, Scribd, www.scribd.com/doc/9080727/Diego-Rivera-and-the-Left-The-Destruction-and-Recreation-of-the-Rockefeller-Center-Mural.

⁵⁵ Dickerman, Leah, et al. *Diego Rivera - Murals for the Museum of Modern Art*: The Museum of Modern Art, 2011.

⁵⁶ *Ibid.*

Studying Rivera's Market

In the 1920s, before receiving the Rockefeller Center commission, Rivera created his foremost Mexican murals. Under the direction of Mexico's minister of education and a government stipend, he visited France and Italy to study works by Renaissance artists. The Mexican government hoped that this might provide a foundation for the development of new art for post-revolutionary Mexico. Rivera's work, based on the study of Cubism as well as of Italian Renaissance frescoes, had been internationally recognized as a major contribution to the creation of a modern yet socially committed art, particularly during the Great Depression.⁵⁷ Already reaching international acclaim, Rivera piqued the interest of Abby Rockefeller. In September of 1931, Abby purchased Rivera's series of 45 watercolors.⁵⁸ She would go on to play an essential role in making his retrospective exhibition at the Museum of Modern Art (MoMA) a reality. In 1931, he was invited to mount a retrospective exhibition at the MoMA, then just two years old.⁵⁹ The Museum inaugurated the exhibition on December 23, 1931. It was the second retrospective of an individual artist's works at the Museum. The first had showcased the paintings of Henri Matisse. Rivera created eight "portable" murals as the centerpiece of the show. It attracted a record attendance, almost twice as large as the one for the Matisse show that same year.⁶⁰

Up until this point, the vitality of Rivera's market was on the rise and the preservation of his reputation intact – he was internationally celebrated and invincible. The years surrounding Rivera's commission, however, patrons were hesitant to associate with him. In 1933, with the negative publicity surrounding the Rockefeller debacle, the commission to paint a mural for an exhibition at the Chicago World's Fair was canceled. It would take another two years before Rivera would receive a commission for another major project. Between 1935 and 1954, Rivera

⁵⁷ Ibid.

⁵⁸ Ibid.

⁵⁹ Ibid.

⁶⁰ Ibid.

undertakes numerous mural projects. On June 5, 1940, Rivera was invited by architect Timothy L. Pflueger to paint a ten-panel mural for the Golden Gate International Exposition in San Francisco; it was titled *Pan-American Unity*.⁶¹ Letting bygones be bygones, in 1940, Abby Rockefeller provided funds to purchase Rivera's *Agrarian Leader Zapata* for The Museum of Modern Art. Not only did this acquisition cement his international influence, but it marked the inauguration of his placement into the canon.

In Mexico, his mural projects included works for the Hotel Reforma (1936), the National Institute of Cardiology (1943-44), the patio corridor of the Palacio Nacional (1945-51), the Hotel del Prado (1947-48), the Cárcamo del Rio Lerma in the Bosque de Chapultepec (1951), and the Hospital de la Raza (1953).⁶² In retrospect, despite the rights not afforded to Rivera over his commissioned mural, the debacle left Rivera's reputation untainted and his market integrity untouched. Auction results for paintings by Rivera do not fetch at auction until 1985, over 50 years after the Rockefeller commission and therefore will not be analyzed as a metric in determining Rivera's market vitality.

Richard Serra's *Tilted Arc*

In 1963, the General Services Administration of the U.S. (GSA) established the Art-in-Architecture Program, a program that oversees the commissioning of works for new federal buildings nationwide. These works are intended to enhance the civic meaning of federal architecture and showcase the vibrancy of American visual arts.⁶³ In 1979, GSA selected Richard Serra, a renowned American sculptor, to create an outdoor sculpture. Serra signed a contract with GSA setting forth the terms of his commission. The contract provided that Serra would receive a

⁶¹ "Chronology." *Diego Rivera Chronology*, Museum of Modern Art, www.moma.org/interactives/exhibitions/2011/rivera/chronology.php.

⁶² Ibid.

⁶³ "Art in Architecture Program." *U.S. General Services Administration (GSA)*, 13 Aug. 2017, www.gsa.gov/real-estate/design-construction/art-in-architecture-fine-arts/art-in-architecture-program.

fee of \$175,000 for building the sculpture on Federal Plaza.⁶⁴ The contract further provided that "all designs, sketches, models, and the work produced under this Agreement . . . shall be the property of [the United States]." ⁶⁵ No provisions were restricting the Government's use of the sculpture after purchasing it.

In 1981, the finished piece, entitled *Titled Arc*, reached 12-foot high, 120-foot wide, 3-inches thick, and weighed 73 tons. (See Figure 5). Almost immediately after the sculpture's installation, the GSA began receiving complaints from the public concerning its unsightly aesthetic appeal and claims that it obstructed the passage across the plaza.⁶⁶ These complaints were eventually brought before a five-person panel, none of whom had specific expertise in public sculptures.⁶⁷ Serra explicitly contended, "It is a site-specific work⁶⁸ and as such is not to be relocated. To remove the work is to destroy the work."⁶⁹ The final resolution of the public hearings was to relocate *Titled Arc*.

In 1989, the sculpture was cut into three pieces and dismantled in one night. Serra sued GSA and several of its agents on multiple claims: breach of contract, copyright violation, trademark violation, violation of New York statutory law, and violation of his First and Fifth Amendment rights.

In District Court, Serra's claims against GSA's administrators on the grounds of qualified immunity was dismissed. Serra did not appeal this decision. In his second opinion, the District Judge dismissed for lack of subject matter jurisdiction and on claims based on breach of contract, federal trademark statutes, copyright statutes, and state law.⁷⁰ The court held that it lacked

⁶⁴ Serra v. the United States General Services Admin, 847 F.2d 1045 (2nd Cir.1987) [Hereinafter Serra v. GSA]

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ Ibid.

⁶⁸ Site-specific artworks are those where the location is a fundamental constituent of the work itself. The location contributes to its meaning and removal from its location uproots its integrity.

⁶⁹ Serra v. GSA, 847 F.2d 1045 (1987)

⁷⁰ Serra v. GSA, 667 F. Supp. 1042 (1987)

jurisdiction to adjudicate these claims because the U.S. government had not waived its sovereign immunity.⁷¹ The district judge granted summary judgment to GSA on constitutional claims on the grounds that “the decision to relocate *Tilted Arc* was a content-neutral determination made to further significant government interests and that the hearing provided all the process that was due.”⁷² On appeal from the judgment dismissing his suit, Serra challenged the rejection of his free expression and due process claims.⁷³ This appeal came to no avail. In his 1990 essay, *Una stanza per Panza*,⁷⁴ artist Donald Judd weighs in on this matter writing “the purchase price included the guarantee of permanence, in addition to the construction cost being circularly the artist’s contribution...It is certainly a sign of what the U.S. Government is, now that it could destroy Serra’s work”.⁷⁵

VARA was enacted in the wake of the removal of this piece and was expected to make a difference. At the least, this act mandated owners to give artists’ a 90 days’ notice of their intentions so the artists could remove it themselves. With traditional property rights and artist’s moral rights still at odds on the eve of VARA’s enactment, popular opinion still held that VARA impeded property rights.

Studying Serra’s Market

Like Rivera, Serra’s acclaim peaked before the controversy surrounding the removal of his sculpture. This acclaim curbed possible effects on new project prospects and with that his market integrity. Redemption from any possibility of an effect on his market, came in the best way following *Tilted Arc*, as he saw further honors for his work: a retrospective of his drawings at the Bonnefantenmuseum, Maastricht; the Wilhelm Lehmbruck prize for sculpture in Duisburg

⁷¹ Under the doctrine of sovereign immunity, the United States government may not be sued without its consent, and the existence of consent is a prerequisite for jurisdiction.

⁷² *Serra v. GSA*, 847 F.2d 1045 (2nd Cir.1987)

⁷³ *Serra v. GSA*, 847 F.2d 1045 (2nd Cir.1988)

⁷⁴ Judd, Donald, Flavin Judd, and Caitlin Murray. *Donald Judd: Writings*. NY, NY: Judd Foundation, 2016

⁷⁵ *Ibid.*

in 1991; and the following year, a retrospective at Museo Nacional Centro de Arte Reina Sofia, Madrid.⁷⁶ In 1993 Serra was elected a fellow of the American Academy of Arts and Sciences.⁷⁷ In 1994, he was awarded the Praemium Imperiale by the Japan Art Association and an Honorary Doctor of Fine Arts degree from the California College of the Arts in Oakland.⁷⁸ He continues to produce large-scale steel structures for sites throughout the world and has become particularly renowned for his monumental arcs, spirals, and ellipses. From 1997 to 1998 his *Torqued Ellipses* (1997), considered his mid-career series, were exhibited at and acquired by the Dia Center for the Arts, New York.⁷⁹ In 2005 eight major works by Serra were installed permanently at Guggenheim Museum Bilbao, and in 2007 the Museum of Modern Art in New York mounted a major retrospective of his work.⁸⁰

From 1990 to 1994 Serra's sculptures and maquettes have frequently hit the auction block with realized prices within or above their estimates. Only in 2016 did it significantly fall below its estimate.⁸¹ Over six BI's⁸² have taken place within that time.⁸³

Donald Judd's Unauthorized Copies

If there is any case that best model the ramifications of morals rights before VARA's enactment and interpretive application, it would be the case between Donald Judd and Italian art dealer, Giuseppe Panza di Biumo. In this case, the lack of agency for an artist's right to attribution is taken advantage. Judd was among a wave of postwar artists to introduce the idea of industrial fabrication — the removal of the artist's hand — to the conception of art. While Judd executed early works himself (in collaboration with his father, Roy Judd), in 1964 he began

⁷⁶ "Richard Serra." *Guggenheim*, www.guggenheim.org/artwork/artist/richard-serra.

⁷⁷ Ibid.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Ibid.

⁸¹ Artnet

⁸² Bought Ins

⁸³ Artnet

delegating fabrication to professional artisans and manufacturers, each with their area of expertise in given materials or techniques.⁸⁴ These specialty craftsmen made most of Judd's best-known geometric objects, in plywood, metal, and other materials. This hands-off delegation, far from distancing him from the work, seemed only to deepen his control, one of many facts that Panza, failed to understand and honor. Giuseppe Panza di Biumo (1923–2010), recognized as one of the most important collectors of postwar American art, formed between 1966 and 1976, one of the most significant single concentrations of American art of the 1960s and 70s. Within this collection, are the likes of Robert Morris, Dan Flavin and of course, Donald Judd.⁸⁵ In many cases, Panza acquired works in the form of certificates or agreements for their creation at a later date, an arrangement that led to later disputes with several artists who were discontent with Panza's fabrications or installations of their work.⁸⁶ In his 1990 essay, Judd discloses that the central conflict with Panza was about 'permanence.'⁸⁷ "The construction of expensive art and its consequent permanent installation was part of the original agreement with Panza, and not at all that he [would] have paper to sell forever. He never intended to make work responsibly and permanently. He intended to invest in paper."⁸⁸ Panza, the shrewd businessman that he was, knew the documents pertaining to the works held the most value, not the works themselves. In his mind, as long as he had the documents, he could create them as he wished.

Berstein Brothers produced ten of the small pieces in the Panza Collection in Long Island City, Judd's regular fabricator for works in bent and soldered sheet metal, some with highly polished finishes.⁸⁹ It is these small pieces made at the Bernstein Brothers factory that Judd

⁸⁴ "The Panza Collection." *Guggenheim Collection Online*, Guggenheim Museum, www.guggenheim.org/artwork/special_collection/the-panza-collection.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

⁸⁷ Judd, Donald, Flavin Judd, and Caitlin Murray. *Donald Judd: Writings*. NY, NY: Judd Foundation, 2016.

⁸⁸ *Ibid.*

⁸⁹ "The Panza Collection." *Guggenheim Collection Online*, Guggenheim Museum, www.guggenheim.org/artwork/special_collection/the-panza-collection.

considered genuine pieces in Panza’s collection.⁹⁰ According to Judd, “Panza owns only two works of mine that are real [and] that are not made by Bernstein, the plywood piece made by Peter Ballantine at MOCA and the ‘wall’ of galvanized iron installed in Varese.”⁹¹ However, Judd reveals there was very little communication about the site-specific Varese work.⁹² “Since in some works the dimensions could be altered according to the space available, Panza assumed that he could do this as well as me, then destroy the work and do it again differently, forever. But these alterations in some works involving whole spaces are mine to decide, not anyone [else]. If a work is installed permanently, that’s it.”⁹³ Judd also admits that despite informing Panza of his dissatisfaction with the Varese work, he gave in and approved the work - after the fact.⁹⁴ The 16 other works attributed to Judd in Panza’s collection were disavowed. In his essay, Judd accused the collector of making his works from his illustration plans without his approval, incorrectly and with inferior materials.⁹⁵

Through the Leo Castelli Gallery in New York, Panza purchased his collection of Judd works in the form of signed documents. Panza defends that these documents confirm a transfer of ownership and outline his rights to pursue fabrication in compliance with plans provided by Judd (and further instruction from studio assistants and preferred fabricators).⁹⁶ A number of the works—four in plywood and four in metal, were subsequently fabricated at Panza’s request and with, at best, limited supervision by Judd.⁹⁷ Judd asserts “Giuseppe Panza [made] my work

⁹⁰ Ibid.pg. 647

⁹¹ Judd, Donald, Flavin Judd, and Caitlin Murray. *Donald Judd: Writings*. NY, NY: Judd Foundation, 2016. page 648

⁹² The Villa Menafoglio Litta, Varese—an 18th-century palazzo, was a family-owned space Panza showcased his rapidly growing collection. (The villa is now operated as a public museum, managed by the Italian national trust the Fondo per l’Ambiente Italiano.)

⁹³ Ibid. pg. 656

⁹⁴ Judd, Donald, Flavin Judd, and Caitlin Murray. *Donald Judd: Writings*. NY, NY: Judd Foundation, 2016.

⁹⁵ Ibid.

⁹⁶ “The Panza Collection.” *Guggenheim Collection Online*, Guggenheim Museum, www.guggenheim.org/artwork/special_collection/the-panza-collection.

⁹⁷ Ibid.

himself, contrary to the original agreement that it be made only under my supervision.⁹⁸ The artist came to disown Panza's fabrications, publicly proclaiming all but the wall piece in Varese to be "forgeries." On November 26, 1989, after finding the site-specific Varese work remade at the Ace Gallery in Los Angeles, Judd wrote to Panza telling him to stop making his work.

Panza's response in a letter to Judd:

[It] is my will to do installation made by you because [it] will be better than the one made by anybody else. But we have to pay attention to the fact that we are not alive forever. Good art live[s] longer than Artists. You have to be ready to give instructions so clear in order [as] to avoid mistakes in a future a century away.⁹⁹

In response, Judd writes in his essay,

"In other words, I am not as necessary as Panza to my work; he can make it better than I and somehow artists [do not] live forever; but Panza, his collection? Panza ignored instructions over and over and made my work himself. He never asked about an installation; he just did it. Is it interesting now, or in a century, to see Panza's construction of my work or his version of its installation? [It is] better that the work [does not] exist than be wrong. [It was] not made to be wrong."¹⁰⁰

At Judd's insistence, it was destroyed. It would seem Panza had second thoughts about the permanency of the work in Varese and realized that by honoring the work's site-specific intent, he had removed it from sale, and with that, prospects of making more money off of it.

In 1990–92, wishing to keep a part of his collection largely intact, Panza sold and gifted over 350 Minimalist, Post-Minimalist, and Conceptual artworks to the Solomon R. Guggenheim

⁹⁸Judd, Donald, Flavin Judd, and Caitlin Murray. *Donald Judd: Writings*. NY, NY: Judd Foundation, 2016.

⁹⁹ Ibid.

¹⁰⁰ Ibid. pg. 646

Foundation including works attributed to Donald Judd.¹⁰¹ Not missing a beat, an impassioned Judd responds:

"[I am] not going to help the Guggenheim, which, like all four museums in New York City, helped debase the situation there. I am going to stop Panza from copying my work. [Panza] tried to "place" the "Collection" many times in Europe, but the placement always failed. Why? Shouldn't the Guggenheim ask? They seem to know nothing of the attitude of the artists involved or of Panza's failed attempts in Europe. There must have always been a Catch." Judd continues, "Panza wants real power. He wants to be superior to an artist, and more, superior to artists. They are only artists. He is a 'Collector.' The museums will be museums, zoos for artists. Over the front door, it will say 'The Collection of Count Giuseppe Panza di Biumo.' Inside on little labels in small print will be the names of the multitudinous artists. Panza's purpose is to make a lot of money and be famous and powerful. Why support this pretentious, preposterous, and destructive purpose?"¹⁰² Seven other works purchased by Panza in an unrealized state were never fabricated during Judd's lifetime, and they remain in the Guggenheim Museum's collection in the form of documents only.¹⁰³

In the years surrounding the standoff between Judd and Panza, few court cases had interpreted VARA. Therefore, the practical effect of VARA had yet to be determined, and Judd was at the mercy of a self-regulating market that he hoped would hold Panza accountable. Judd's death in 1994 left the status of contested and unrealized works unresolved. Unfortunately, Panza's economic capital and institutional backing outweighed Judd's cultural capital and moral rights weighing heavily in Panza's favor. Not only did these circumstances present complex

¹⁰¹ "The Panza Collection." *Guggenheim Collection Online*, Guggenheim Museum, www.guggenheim.org/artwork/special_collection/the-panza-collection.

¹⁰² Ibid.

¹⁰³ "The Panza Collection." *Guggenheim Collection Online*, Guggenheim Museum, www.guggenheim.org/artwork/special_collection/the-panza-collection.

questions regarding the practical and philosophical nature of Judd's practice, but it brought into question the responsibilities of the museums and collectors.

Studying Judd's Market

Judd's design practice, artwork, and writings had a significant influence on the course of late 20th-century sculpture, design, and furniture. While he firmly rejected the term, he became a representative of the Minimalist art movement.¹⁰⁴ Although his first solo exhibition was organized in 1957 by Panoramas Gallery, it would not be until the early 1960s that Judd would switch from painting to sculpture to explore industrial processes and materials.¹⁰⁵ His second solo exhibition in 1963, held at the Green Gallery in New York, laid the groundwork for the long series of individual exhibitions at the Leo Castelli Gallery from 1965 - 1985.¹⁰⁶ Five years after his second solo exhibition, the Whitney Museum of American Art organized his first retrospective in 1968 legitimizing his credentials to participate in the 1971 Guggenheim International Award exhibition at the Guggenheim Museum in New York.¹⁰⁷ For almost four decades, Judd exhibited throughout the United States, Europe, and Asia with his work in museum collections worldwide. Major exhibitions of his work include Stedelijk Van Abbemuseum, Eindhoven in 1970; the National Gallery of Canada in 1975; the Whitney Museum of American Art in 1988; and Tate Modern, London in 2004.¹⁰⁸ He participated in his first Venice Biennale in 1980 and Documenta, Kassel, in 1982.¹⁰⁹ In 1984, he started designing furniture for manufacturing and was very explicit in separating his design practice from his artwork. In his 1993 essay he writes:

¹⁰⁴ "Biography." *Judd Foundation*, juddfoundation.org/artist/biography/

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

¹⁰⁹ "Donald Judd - Artists." *Susan Sheehan Gallery*, www.susansheehangallery.com/artists/donald-judd.

The configuration and the scale of art cannot be transposed into furniture and architecture. The intent of art is different from that of the latter, which must be functional. If a chair or a building is not functional, if it appears to be only art, it is ridiculous. The art of a chair is not its resemblance to art but is partly its reasonableness, usefulness, and scale as a chair. A work of art exists as itself; a chair exists as a chair itself.¹¹⁰

Following his long-term representation by Castelli, Judd would go on to work with the Paula Cooper Gallery in New York where he had another series of solo exhibitions, and Pace Wildenstein, who represented him through the end of his life. In 1986, Judd founded the Chinati Foundation, a non-profit art foundation, tasked with the mission of preserving and presenting the permanent collections of his large-scale works as well as his contemporaries.

Notwithstanding his impressive accolades, it is reasonable to assume Judd's market may have suffered at the hands of incompetent gatekeepers tasked with honoring his artistic intent. Only through the revelation of his published 1990 essay did the public begin to understand the discrepancy of authorship with works attributed to him. The year following his 1990 essay, from September 13 – October 19, 1991, Pace Gallery presented an exhibition showcasing his new sculptures. These new works reveal his increasingly free use of color and his new casualness concerning composition.¹¹¹ Judd also reworked earlier pieces, employing different materials (as in the case with one of his very first works, the box with a pipe from 1963).¹¹² This practice can be interpreted as a refusal of linear history. In the curator's essay of the exhibition catalog, Yve-Alain Bois writes, "only recently, after reading Judd's diatribe against Panza and his various dishonest practices, [did] I discover (almost with pleasure) the involuntary nature of the effect in

¹¹⁰ Judd, Donald, Flavin Judd, and Caitlin Murray. *Donald Judd: Writings*. NY, NY: Judd Foundation, 2016.

¹¹¹ Judd, Donald, and Yve-Alain Bois. *Donald Judd - New Sculpture: September 13 - October 19, 1991*. The Pace Gallery, 1991.

¹¹² Judd, Donald, and Yve-Alain Bois. *Donald Judd - New Sculpture: September 13 - October 19, 1991*. The Pace Gallery, 1991.

question, that it was only one of many instances of museum incompetence that his art often suffered." ¹¹³ He goes on to say how this missed opportunity effectively closed Judd's production off to him for a long time. ¹¹⁴ Bois may not have been alone with these sentiments.

Judd passed away only four years after his 1990 essay and within that time (1991 – 1994) Judd's sculptures have hit the auction block 97 times. ¹¹⁵ Of the 97 sculptures at auction sold between January 1991 – December 1994, 62 works were either bought in or fetched below estimates. ¹¹⁶ The highest work achieved during this time was in 1994 when a work sold for over \$288,000. ¹¹⁷ Whether this 70% figure of underachieving sales is indicative of a strong correlation between his 1990 essay and a lack of market confidence, or ill-timing of placing his works up for auction, it is not until eight years later in 2002 that his sculptures would achieve bids in the six-figure range at auction. Interestingly enough, his top five highest achieving sale results at auction for sculptures are stamped with the Bernstein insignia, a testament to honoring his request of attributing his genuine works to their factory. What positioned Judd in the best possible advantage concerning issues of attribution with his work, was the establishment of his very own foundation.

Initially conceived in 1977, and created two years after his passing in 1996, the Judd Foundation was founded to preserve his art, spaces, libraries, and archives as a standard for the installation of his work. ¹¹⁸ The institution of a governing body whose success is measured by the ability to preserve and protect Judd's integrity and reputation has curtailed the after effect of a series of unattributed and falsely attributed works from flooding the market and adversely affecting his overall market.

¹¹³ Ibid.

¹¹⁴ Ibid.

¹¹⁵ Artnet

¹¹⁶ Artnet.

¹¹⁷ Ibid.

¹¹⁸ "Biography." *Judd Foundation*, juddfoundation.org/artist/biography/

In 2006, in order to create a \$20 million endowment to refurbish 16 of the Foundation's permanently installed buildings in New York and Texas, the Foundation decided to sell about 35 sculptures at Christie's New York.¹¹⁹ Christie's offered a reported \$20 million guarantee and agreed to display the consigned work for five weeks in New York on the 20th floor of the Simon & Schuster building.¹²⁰ Concerns that the sale would have an adverse effect on his market proved unfounded and the exhibition itself, bringing in over 11,000 visitors, won an AICA¹²¹ award for "Best Installation in an Alternative Space" for 2006.¹²² The concerns for his market, while valid, were about flooding the market by offering too many works by one artist at once. This concern was addressed by the co-head of postwar and contemporary art for Christie's worldwide, Brett Gorvy, in a New York Times interview, "Many of the works for sale were also in the Tate's exhibition last year. [We have] been very selective, choosing a spread of works that cover the gamut of our collecting base. As we did with de Kooning last year, we believe that by creating excitement around an artist, you can get phenomenal prices."¹²³ Marianne Stockebrand, the director of the Chinati Foundation at the time, resigned from her post on the Judd Foundation's Board partly in protest of the auction. "I have a different view," said Ms. Stockebrand, "I was in favor of a slower approach, to sell things one at a time and place them in collections carefully, which would have been better for Judd's legacy. With auctions, you have no control over where things go."¹²⁴ Six years later, in a Christie's 2012 sale, his work would go on to achieve its highest sale at auction for \$10.2 million.¹²⁵

¹¹⁹ Vogel, Carol. "Donald Judd Sculptures to Be Auctioned." *The New York Times*, The New York Times, 24 Feb. 2006, www.nytimes.com/2006/02/24/arts/design/donald-judd-sculptures-to-be-auctioned.html.

¹²⁰ Ibid.

¹²¹ American section of the International Association of Art Critics

¹²² Villarreal, Ignacio. "Christie's and Judd Foundation Will Receive Best Show Award." artdaily.com/news/18851/Christie-s-and-Judd-Foundation-Will-Receive-Best-Show-Award#.XAmIy2ZNQI.

¹²³ Vogel, Carol. "Donald Judd Sculptures to Be Auctioned." *The New York Times*, The New York Times, 24 Feb. 2006, www.nytimes.com/2006/02/24/arts/design/donald-judd-sculptures-to-be-auctioned.html.

¹²⁴ Ibid.

¹²⁵ Artnet.

**PART TWO
AFTER VARA**

CHAPTER 3 EXERCISING MORAL RIGHTS POST – VARA

So far, the lack of accountability on the part of the U.S. government to adopt moral rights has allowed for government censorship (i.e., Richard Serra), cultural vandalism (i.e., Diego Rivera), and misattributed works of art (i.e., Donald Judd). It would be remiss to discuss the ramifications of artist's exercising their moral rights without including contemporary artist, Cady Noland and the subsequent disavowal of her work following restoration treatment. Contrary to the aforementioned cases where moral rights were ignored or simply rejected, the case involving Cady Noland, Marc Jancou, and Sotheby's Auction house introduces just how far the institutional systems in the U.S. art market have come not only in recognizing moral rights but honoring those rights. Now, in part two of this paper, the accountability has shifted. The onus of recognizing moral rights lies not in the shortcomings of the U.S. government failing to enact them, but rather the *enforcement* of these rights by art market gatekeepers.

Cady Noland, *Cowboys Milking*

In this case, art dealer Marc Jancou brought an action in New York state court against Sotheby's Auction house and artist Cady Noland. This action was brought after the auction house removed Noland's *Cowboys Milking* from the sale following the artist's disavowal of the work's authorship. On September 9, 2011, Jancou entered into a consignment agreement with Sotheby's for a November 2011 sale of *Cowboys Milking*, an aluminum print. (See Figure 6). Noland's attorney declared her objection to the auctioning of the work because it "materially differed from...its creation."¹²⁶ The letter asserted Noland's right to disavow her work under VARA, stating, "her honor and reputation [would] be prejudiced as a result of offering Cowboys Milking...in light of the material and detrimental changes to the work."¹²⁷ In essence, Noland

¹²⁶ *Marc Jancou Fine Art Ltd. v. Sotheby's, Inc. and Cady Noland*, 2012 N.Y. Misc. LEXIS 6059, aff'd, 2013 N.Y. App. Div. LEXIS 4814 (June 27, 2013) [Hereinafter *Jancou v. Sotheby's and Noland*].

¹²⁷ *Ibid.*

was asserting VARA granted her moral rights over her work, and it was the responsibility of the auction house to honor these rights.¹²⁸

Sotheby's attempted to dissuade Noland from removing the work but immediately notified Jancou when their efforts proved unsuccessful. Jancou provided Sotheby's with a conservator's report written by contemporary art conservator, Christian Scheidemann, dated June 30, 2011, that stated, "Compared to many other aluminum sheets of this body of work, this particular work is in very good condition...However, all four corners are bent and slightly deformed. On the left side upper edge, there is a 3" long deformation in the metal."¹²⁹ In describing the "Actual Treatment" by the conservator, the report read, "The corners were straightened multiple times with minor success. Also, the upper left side edge was bent back into straight shape with little success. The work appears now better maintained than before. Some deformations, however, will always be noticeable."¹³⁰ It must be noted that Scheidemann did not consult with Noland before making any restorations. Additionally, Sotheby's condition report noted that when the print arrived in its central receiving area, there was some bending of the aluminum at the corners and small indentations on its surface. Given the artist's objections, Sotheby's withdrew the print from auction.

In February 2012, Jancou brought suit against Sotheby's and Noland in New York State Supreme Court, asserting that Sotheby's was liable for breach of contract and breach of fiduciary duty, and Noland was liable for tortuously interfering with the consignment agreement.¹³¹ Sotheby's counterclaimed for breach of contract and fraud, on the grounds that Jancou failed to disclose previous restoration efforts and his failure to disclose that the work had previously been

¹²⁸ Ibid

¹²⁹ Ibid.

¹³⁰ Ibid.

¹³¹ Jancou v. Sotheby's and Noland, 2012 N.Y. Misc. LEXIS 6059, aff'd, 2013 N.Y. App. Div. LEXIS 4814 (June 27, 2013)

withdrawn from Christie's as a result of Noland's objection on the same grounds.¹³² Sotheby's moved for summary judgment, and Jancou filed a cross-motion for partial summary judgment.¹³³

The court granted Sotheby's motion, holding that, as a matter of law, there was no issue of material fact as to whether Sotheby's performed its contractual and fiduciary duties to the plaintiff.¹³⁴ The agreement between the parties specified that Sotheby's retained the right to withdraw "any property at any time before the sale if in its sole judgment there is doubt as to its authenticity or attribution."¹³⁵ Given this provision, the court believes Sotheby's was within its rights to withdraw the print from the auction following Noland's disavowal, which, the court also stated, was supported by both the conservator's report and Sotheby's condition report.¹³⁶ The court also held that there was no triable issue of fact precluding summary judgment against Sotheby's for breach of fiduciary duty because there was no evidence that Sotheby's acted in bad faith.¹³⁷ The court stated that resolution of the motion and cross-motion for summary judgment did not require interpretation of VARA.¹³⁸ The court later granted summary judgment to Noland on Jancou's tortious claim, noting that breach of an underlying contract is an essential element of a tortious claim and that, because Sotheby's did not breach its contract with Jancou, Noland could not have interfered.¹³⁹ In the Appellate Division, the court unanimously affirmed the dismissal of Jancou's claims against Sotheby's and Noland in June 2013. Counterclaims filed by Sotheby's and Noland against Jancou settled in November 2013.

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

Although the court determined it unnecessary to interpret VARA, Sotheby's honored Noland's moral rights and legitimized her disavowal as a substantial, objective basis for doubting the work's attribution.

Cady Noland, *Log Cabin Façade*

Similar to Donald Judd, Noland's artistic process involved little to none of her physical hand. In the case of the *Log Cabin Façade*, Noland's manufacturer, Master Log Homes, prepared construction blueprints based on her recommended dimensions and sketches.¹⁴⁰ Upon her approval of the construction blueprints, she ordered the parts and had them shipped to Max Hetzler Gallery in Germany where they were assembled according to her plans.¹⁴¹ In the summer of 1990, Noland visited the gallery to examine the work and approved its construction. (See Figure 7). Noland was made aware of its sale to Wilhelm Schürmann in August 1991 after receiving a letter from the gallery.¹⁴² Schürmann sought permission to display the work outdoors and was approved by Noland to apply a dark stain to the work.¹⁴³ Noland asserts in the court documents that the stain was to be used as a pigment for "aesthetic reasons," not a wood preservative.¹⁴⁴ (See Figure 8). From the mid-1990s until July 2014, the two did not maintain contact. It was not until July 18, 2014, that Noland received a letter from art advisor, Brett M. Shaheen on behalf of his "mystery client" about the piece. In this letter, Shaheen informed Noland that the piece had been on unprotected ground for ten years without being monitored and therefore suffered significant

¹⁴⁰ Southern District of New York. *Affidavit of Plaintiff, Cady Noland in Opposition to Defendants' Motion to Dismiss*. no. 1:17-cv-05452-JPO, 3 Aug. 2018. *Exhibit B*. https://greg.org/wp-content/uploads/2018/09/noland_log_cabin_artist_affidavit_79B.pdf.

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ Southern District of New York. *Affidavit of Plaintiff, Cady Noland in Opposition to Defendants' Motion to Dismiss*. no. 1:17-cv-05452-JPO, 3 Aug. 2018. *Exhibit B*. https://greg.org/wp-content/uploads/2018/09/noland_log_cabin_artist_affidavit_79B.pdf.

¹⁴⁴ *Ibid.*

deterioration.¹⁴⁵ He went on to explain that Schürmann had all of the logs replaced except the American flag and certain metal components.¹⁴⁶

Noland faxed Shaheen a handwritten note that stated, “This is not an artwork [sic]. If the previous owner did work with a so-called conservator, I certainly was not consulted, nor did I approve whatever was done”.¹⁴⁷ (See Figure 9). On July 21, 2014, Noland received a letter from Scott C. Mueller who identified himself as the "mystery client." Mueller said his "goal was to give the piece to the Cleveland Museum of Art" but because it did not work out, he "planned on returning the piece" to Galerie Michael Janssen.¹⁴⁸ Noland later learned that Mueller had already purchased the reconstructed work from the Gallery for \$1.4 million. On December 2, 2014, gallery owner, Michael Janssen wrote to Noland acknowledging his “oversight” and asked if there was a way “to restore the integrity of the work, not only for monetary reasons but also because [he] believed it to be an important part of [her] work as an artist”.¹⁴⁹ She felt strongly that the ‘unauthorized copy of Log Cabin’ “robbed her work of a quarter century of history and denigrated [her] honor and reputation.”¹⁵⁰ When she renounced the piece, Mueller sued the Galerie Michael Janssen and Shaheen for breach of contract and breach of fiduciary duty, respectively. Shaheen sought dismissal of the case, asserting that no fiduciary duty existed between the advisor and the buyer. The court agreed and dismissed the case against Shaheen.¹⁵¹ The court also dismissed the case against the gallery since Mueller had failed to serve the complaint to the gallery, which was in Berlin.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ Ibid.

Standing her ground, in July 2017, Noland filed a lawsuit claiming her copyright was violated by hiring a conservator to repair her sculpture without consulting her.¹⁵² She felt the repair went way beyond the bounds of common conservation efforts. She sued Schürmann; KOW Gallery of Berlin, which displayed the work in a 2011 exhibition; Galerie Michael Janssen; Janssen himself; and dealer Chris D'Amelio-all whom Noland claimed were involved in the decision to refabricate the work after the wood began to rot.¹⁵³ The defendants filed a motion to dismiss the case describing the suit as “a desperate but futile search for a cause of action, by an artist with a history of trying to keep artworks created by her from being sold.”¹⁵⁴ They go so far as to claim the artistry of the work lies in the idea behind it, not the physical expression of the logs piled on top of one another and for that reason is too generic to copyright.¹⁵⁵ Interestingly enough, the US Copyright Office has repeatedly rejected Noland’s application to register *Log Cabin* as a work of art “because the work lacked the minimal degree of creativity to qualify for registration”¹⁵⁶ - a clear reflection of their inability to understand conceptual art.

Studying Noland’s Market

‘Difficult’ is a term used quite often regarding Noland's handle of her work's integrity. Considering her involvement with legal suits over the last eight years, it is a reasonable notion. Also, Noland exercises tight control over the exhibition and publication of her work. Donald Judd said it best, “almost all serious artists have offended people in defending their work from

¹⁵² Halperin, Julia. “Art Dealers Strike Back at Cady Noland in an Increasingly Philosophical Legal Dispute About a Restored Sculpture.” *Artnet News*, Artnet News, 6 Apr. 2018, news.artnet.com/art-world/noland-log-cabin-lawsuit-1259900.

¹⁵³ Noland v. Michael Janssen Gallery Pte., Ltd et al., 1:17-cv-05452 (S.D.N.Y. July 18, 2017) [Hereinafter Noland v. Janssen Gallery]

¹⁵⁴ Ibid.

¹⁵⁵ Noland v. Janssen Gallery, 1:17-cv-05452 (S.D.N.Y. July 18, 2017)

¹⁵⁶ Halperin, Julia. “Art Dealers Strike Back at Cady Noland in an Increasingly Philosophical Legal Dispute About a Restored Sculpture.” *Artnet News*, Artnet News, 6 Apr. 2018, news.artnet.com/art-world/noland-log-cabin-lawsuit-1259900.

absurdities and so almost all [artists] are ‘difficult’ [sic]. Artists are supposed to be.”¹⁵⁷ Since the early beginnings of her post-modern, conceptual work, her subject matter depicted the dark side of the American dream with motifs of idolatry, violence, greed, and chauvinism.

After settling in New York, Noland had her first solo show in 1988 at White Columns Gallery, New York.¹⁵⁸ In 1991 she was invited to show at the Whitney Biennial, New York and the following year at Documenta 9 in Kassel.¹⁵⁹ From March 26 – April 23, 1994, she showed at Paula Cooper Gallery.¹⁶⁰ As she gained international acclaim and celebrity status, her themes would become even darker and more disturbing. She exhibited less and less in the mid-1990s, and one of her last shows was in 1999 at the Migros Museum in Zurich.¹⁶¹ Out of dissatisfaction with the opportunistic and speculative nature of the art market, Noland withdrew from art in the late 1990s. Nevertheless, her work would go on to show at exhibitions, land in museum collections and achieve record figures at auction.

An homage to her absence and devotion to her oeuvre was made in a provocative 2006 exhibition by the Triple Candie gallery, entitled *Cady Noland Approximately* (April 21 – May 21, 2006).¹⁶² In it, four artists assembled a version of a retrospective through unauthorized remakes of Noland’s work.¹⁶³ Noland was not consulted nor notified about its conception, but an attempt was made to replicate the original artworks as faithfully as possible. The works were not intended to be viewed as reproductions.¹⁶⁴ They were approximations made handicapped by practical limitations (e.g., lack of money and technical expertise; insufficient information about

¹⁵⁷ Judd, Donald, Flavin Judd, and Caitlin Murray. *Donald Judd: Writings*. NY, NY: Judd Foundation, 2016. Page 654.

¹⁵⁸ “Cady Noland.” *Paula Cooper Gallery*, www.paulacoopergallery.com/exhibitions/cady-noland/installation-views.

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² “Cady Noland Approximately: Sculptures & Editions, 1984 - 1999 (April 21 - May 21, 2006).” *Almost Baroque*, Triple Candie, www.triplecandie.org/Archive%202006%20Cady%20Noland.html.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

scale, materials, or color; and a limited time-frame).¹⁶⁵ The intended shortcomings of the exhibition were meant to incite the public's desire and curiosity to experience the real thing, which remains, even to this day, a mystery. Not only is it rare to see her sculptures in person, but the lack of monographs published on her art as well as her imperious control over her work's copyright, make it near impossible to see in books.¹⁶⁶

Looking exclusively at Noland's U.S. auction results for prints, multiples, and sculptures, in 1993, her works fetched between \$10,000-\$20,000.¹⁶⁷ Between 1994 to 1996, around the time she was intentionally showing less of her works, her works experienced several BIs and her auction results slumped below \$6,000.¹⁶⁸ Her market would not see an uptick on the U.S. auction block until two years later in 1997 where it achieved over \$26,000.¹⁶⁹ In 1999, the same year of her last show in which she would actively participate, her work would fail to sell at auction completely. From 2001 to 2003, her works would jump from a \$26,000 range to a \$66,000 range.¹⁷⁰ Her first six-figure sale would not take place until 2010 when her *Gibbet* piece would fetch \$1.7 million (with a \$600,000 - \$800,000 estimate).¹⁷¹ The following year, her 1989 work *Oozewald* set the record for the highest price ever paid for a female artist at *Sotheby's* when it auctioned for \$6.6 million. This figure is telling considering this is the same year she disavowed the *Cowboys Milking* piece. Had this work met Noland's specifications, it could have set a whole new record. Her 1989 red silkscreen on aluminum of Lee Harvey Oswald, titled *Bluewald*, sold for \$9.8 million at Christie's in May 2015, setting a new auction record for the artist.¹⁷² To this day, she remains one of the most expensive living female artists at auction.

¹⁶⁵ Ibid.

¹⁶⁶ "Cady Noland Approximately: Sculptures & Editions, 1984 - 1999 (April 21 - May 21, 2006)." *Almost Baroque*, Triple Candie, www.triplecandie.org/Archive%202006%20Cady%20Noland.html.

¹⁶⁷ Artnet.

¹⁶⁸ Ibid.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² Ibid.

Richard Prince Disavows Portrait

In 2014, appropriation artist Richard Prince created from his New Portrait series, a screenshot photograph from Ivanka Trump's Instagram feed. The photo was printed on canvas and captured her taking a selfie while getting her makeup done. He sold the piece for an alleged \$36,000 to an art advisor, who was presumably acting as an intermediary for the Trump family because Ivanka subsequently posted another Instagram photo of herself next to the portrait.¹⁷³ (See Figure 10). After the 2016 election, as an act of protest directed at Donald Trump, who at the time, was due to be sworn in as the 45th president, Prince returned payment for the Ivanka portrait to the advisor and Tweeted: "This is not my work I did not make it. I deny. I denounce. This fake art." In 2017, he posted via Twitter, "Not a prank. It was sold to Ivanka Trump, and I was paid 36k on 11/4/2014. The money has been returned. She Now Owns A Fake."¹⁷⁴ Under VARA, the statute is explicit in stating that artists have the right to prevent any *intentional* distortion, mutilation, or other modification of a work which would be prejudicial to his or her honor or reputation.¹⁷⁵ Prince falls short in defending this right under VARA considering no *intentional* or physical damage was done to the work. He may convincingly argue that by posing with the work, Ivanka's personal and political ties to the White House administration could adversely affect the work's resale value thereby affecting his market integrity and with that, his reputation. The key component missing from this defense, however, is intent and proving Ivanka intentionally posed with the piece to damage the work's integrity is a defense where he has no standing.

¹⁷³ Sutton, Benjamin. "Richard Prince Disowns His Ivanka Trump Portrait, Possibly Increasing Its Value." *Hyperallergic*, Hyperallergic, 13 Jan. 2017, hyperallergic.com/351403/richard-prince-disowns-his-ivanka-trump-portrait-possibly-increasing-its-value/.

¹⁷⁴ Illustration found in Appendix

¹⁷⁵ 17 U.S. § 106A Code 113(d)

Richard Prince at it Again

Like clockwork and staying true to his craft, in the summer of 2018, the artist renounced a show of his early work (1988 – 1992) at Skarstedt Gallery in London entitled “Early Joke Paintings” which showed June 26, 2018 – August 3, 2018.¹⁷⁶ Responding in the best way he knows how, Prince tweeted, “just to make it clear. I have nothing to do with this show. I can't stop someone from showing my work. But you could at least wait till I die.”¹⁷⁷ In the comments below his original tweet, he added: “Memo to artists: Be Careful. Why? Just b-Kaws”¹⁷⁸ Prince’s reference to pop artist KAWS alludes to Skarstedt’s recent announcement of their representation of Kaws following the controversy surrounding his leave from his former gallery, Mary Boone. While this renouncement comes as no surprise, especially given Prince’s past doings, there’s still the question of whether the market is expected to interpret this as him having no affiliation with the show or him disavowing the works associated with this show. Under VARA Prince may assert his right to prevent the use of his name as the author of the works in the show,¹⁷⁹ however, it is unconvincing to assert it is as a result of a distortion, mutilation, or other modification that would be prejudicial to his honor or reputation.¹⁸⁰

Studying Prince’s Market

In the mid-1970s, Prince made drawings and collages.¹⁸¹ In 1977, he began pulling images from consumer culture including social media, advertising and entertainment and re-photographed them as his own redefining the concepts of authorship, authenticity and ownership.¹⁸² His works have been the subject of major solo exhibitions, including the Whitney

¹⁷⁶ The Art Newspaper. “Richard Prince Denounces Exhibition of Early Joke Paintings at Skarstedt Gallery. Or Does He?” *Twitter*, Twitter, 31 May 2018, twitter.com/theartnewspaper/status/1002183074313097216?lang=en.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ 17 U.S. Code § 106A

¹⁸⁰ *Ibid.*

¹⁸¹ “Richard Prince.” *Gagosian*, 12 Apr. 2018, gagosian.com/artists/richard-prince/.

¹⁸² *Ibid.*

Museum of American Art, New York (1992). His works can also be found in the public collections of the Metropolitan Museum of Art, New York; Modern Art Museum of Fort Worth, Texas; Museum of Fine Arts Collection, Boston; Museum of Modern Art, New York; and the Victoria and Albert Museum, London.¹⁸³ He joined Gagosian Gallery in 2005 and had 13 solo shows at their various international locations.¹⁸⁴ In this same year at Christie's New York, his first re-photographed work achieved a sum in the six-figure range.¹⁸⁵

During the time of Prince's disavowal of the Ivanka portrait, he was represented by Gagosian Gallery, a gallery known for exhibiting the most influential artists of the 20th and 21st century. Given this gallery representation and the many layers of appropriation, legal controversy, and conceptual framing that characterize Prince's oeuvre, it is unclear whether his public disowning of the work has negatively affected its worth and status as an authentic Richard Prince, or, on the contrary, added to its resale and cultural value.

Having voiced his criticisms of existing power structures, consumerism and the rising influence of the mass media, one would think he would avoid playing into these existing structures and platforms. Not only does he play directly into them, but he tests just how far he can go. As mentioned above, Prince is no novice to legal controversy, and for this reason, it would seem his disavowal will have no adverse effect on his overall market. For example, following the successful sales at Gagosian Gallery of Prince's "New Portraits" series, lawsuits were filed against Prince for copyright infringement by some of the subjects depicted in the portraits and well as by a photographer whose work was featured.¹⁸⁶ Before that, in December 2008, photographer Patrick Cariou filed a lawsuit for copyright infringement against Prince, the

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Artnet.

¹⁸⁶ Donald Graham v. Richard Prince et al., 1:15-cv-10160. (2018)

Gagosian Gallery, and Larry Gagosian.¹⁸⁷ The appellate court ruled in favor of Prince’s fair use argument solidifying his ability to appropriate any source, as long as the resulting work could be perceived by a “reasonable viewer” to have a “transformative” element.¹⁸⁸

Prince’s continued tactics of pushing the envelope on the limitations of his rights seem to incite only further discussion of his work giving him the publicity he so desperately desires. His most recent stunt with the Skarstedt’s showcase of his early works may be the reminder of just how much controversy plays into his artistic process. Before his renouncement, the auction record for a Joke painting from his early works fetched \$4.8 million, made at Christie’s, New York in 2016.¹⁸⁹ Only time will tell the extent these provocative tactics will depreciate the value of his works.

As more and more artists have adopted practices that test the parameters of their moral rights, more questions than answers remain regarding VARA’s application and with that, its efficacy in the U.S. art market. Plagued by greed, breached contracts, opaque transactions, and unregulated loopholes, it is simply impractical to expect an ambiguous piece of legislation to dismantle such a flawed system. However, as the aforementioned cases have revealed, checks and balances system must be integrated into the art market to ensure oversight and accountability. So where is the common ground and how can this impasse be ameliorated? The answer is to implement and integrate policies into the marketplace that will curb the likelihood of these cases from happening in the first place. The next chapter extrapolates insight from professionals in the art advisory, insurance, and conservation field manifesting in the form of a guide about the best professional practices of conduct for agents and artists alike.

¹⁸⁷ *Cariou v. Prince*, No. 11-1197 (2d Cir. 2013)

¹⁸⁸ *Ibid.*

¹⁸⁹ Artnet.

CHAPTER 4 BEST PROFESSIONAL PRACTICES

Preventative Measures Before Leaving the Studio

When an artist sends their works out of the studio either for sale or for a loan, it is in their best interest to accompany the work with their own prepared 'condition report.' Even if by the artist's standards the work is considered to be in pristine condition, a condition report is vital. Congress was careful to delineate inherent vices of the materials used and modifications from restoration efforts as exceptions to VARA coverage, so the slightest irregularity or blemish should be documented. A full description of the work's dimensions, materials, execution year, and distinctive markings should be accompanied with photographs of the work citing the images 'under artist's copyright.' In addition to a copy of this report being sent with the work, another should be retained for the artist's records. Additionally, whether it be included in the sale contract, loan agreement or an addendum, the artist should outline whom to get in contact with and how if the piece gets damaged or in need of repair as well as suggested courses of action in the event the artist cannot be reached or no longer living. Once these precautions are taken, and the work has entered the market, the onus then falls on the market gatekeepers to honor the given information.

Dealing with Artists' Moral Rights

Gatekeeping agents, whether it be a patron, dealer, or auction house intermediary, must not limit their role to a non-agency contractual relationship. In such a relationship, the responsibilities of the parties involved are bound within the constraints of the contract. One side performs ministerial acts in the capacity of a facilitator and the other acts as a 'customer' as opposed to a 'client.' Ministerial acts are those that aide the transaction in moving forward, rather than in the form of a service to the client. Having expertise or substantive art market knowledge is not required. If there is a non-agency contractual relationship, the roles must be explicitly

defined and the contract's language coherent. In each of the cases mentioned in this paper, there was a recurring theme of gatekeeping agents thinking it acceptable to work within the capacity of a non-agency contractual relationship. That is, they worked as though no relationship existed beyond the contract. Not only is this immoral, but given the unregulated nature of the art market, it strengthens the defense of integrating a stricter checks and balances system. With that being said, the art market gatekeepers must take on the role of an agent and nothing less.

When dealing with agency, the relationship is more than just a contractual one, the agent's responsibilities extend beyond the confines of the contract and enforce a higher duty of diligence. It imposes a fiduciary duty. A fiduciary's¹⁹⁰ responsibility is to subordinate her self-interest to that of the principal¹⁹¹. Even the absence of a clause in the contract detailing the agent's fiduciary duty does not relieve her of it. When tasked with the care or custody of artwork, the fiduciary is liable to deal fairly and honestly, disclose all relevant information to the principle, account for dispositions of the property, and to care for and manage the property prudently. If damage or loss occurs, the law presumes the fiduciary liable unless it can show it exercised due diligence, a reasonable standard of care, and that it was not negligent in any way.

¹⁹² Unfortunately, even with these conditions, agents have found ways to cut corners and take advantage of the subjective interpretation of these expectations. In each of the cases highlighted in this paper, the issues always arose out of the shortcomings of the fiduciary agent. Whether it be in the case of the Rockefellers not extending Rivera his right to preserve his mural before its destruction or Panza partaking in self-dealing, all failed to subordinate their self-interest to that of the artist.

¹⁹⁰ An agent who has undertaken to act for and on behalf of another giving rise to a relationship of trust and confidence, i.e. gallery, auction house, museum.

¹⁹¹ The party that gives legal authority to an agent to act on their behalf.

¹⁹² Negligence is conduct which falls below the standard of care to the circumstances.

Agents must remind themselves that it is in their best interest to prioritize the interests of the artist above their own. Agents may not lawfully profit from a conflict between their personal interest in a transaction and their principal's interest in that same transaction. It only creates counter-productive measures. In the case of Giuseppe Panza, the unauthorized recreations of Judd's works were done at the expense of misattributed works flooding his market and putting the integrity of his quality of work at stake – a clear failure in avoiding self-dealing. On the other hand, even the most honorable dealers cannot always meet every demand of their artists. There then needs to be put in place countermeasures in the event the standard of duty is unattainable. This, of course, is no excuse for fiduciary reprieve, but it leaves a margin for error and minimizes the risks of a lawsuit later down the line. The succeeding section rolls out the best practices provided by a New York Art Advisor and Laura Doyle, Vice President and Collections Manager of Personal Risk Services at Chubb Insurance, for handling damaged works and reintroducing disavowed works back into the market.

Integrating Damaged and Disavowed Works Back into the Market

In an ideal world, a damaged work is restored, reappraised and returned to market. However, the world is not so, and no process is ever that simple.

1. In the event a work is damaged, or the integrity of the work is at stake, preserve the evidence. Photographs should be taken of the work as well as the accompanying materials including crates and packaging. An unofficial condition report should be made detailing the extent of the damage and as much information as possible about the cause of damage. These documents should be maintained as a digital and physical copy.
2. If the owner is not already made aware of the work's state, she should be. The supporting documents, photographs, and informal condition report should immediately be sent to the owner.

3. The artist or ‘representing agent of the artist’¹⁹³ should be sought out for insight on the best course of action. The New York art advisor revealed in one case that he had to reach out to a contemporary British artist regarding the damaged work, and was required to cut the large scale, acrylic on vinyl painting into strips and return it to him via Fed Ex.¹⁹⁴ Not only does involving the artist at this stage recognize their existing rights, but it ensures the works’ integrity by honoring the artist’s intent. In a case like Robert Rauschenberg, the artist was fine with some of his works aging and showing signs of damage but was particular about his white monochromes being kept in pristine condition, even at the expense of it being recreated post-mortem. Even if the artist or representing agent cannot be reached, the contract would ideally lay out how damage incidents are handled and whose insurance will cover the loss. If this is not stipulated and the artist or representing body cannot be reached, “notify the insurance company, who will then send an adjuster to assess the damage.”¹⁹⁵ If the work is not covered by insurance and nothing is stated in the contract, revert to reaching out to the artist or representing agent.

Taking these initial steps could have been the game changer in preventing the suit involving Cady Noland’s disavowal of *Cowboys Milking* and *Log Cabin Façade*. Had the former owners, or even the conservators involved, reached out to Noland before modifying the piece, the situation would have been handled without getting lawyers involved.

4. After the appropriate parties have given their authorization for the work to be restored, the conservator restores the work balancing the artist’s intent and the client’s interests.

¹⁹³ The estate, foundation, gallery manager, etc.

¹⁹⁴ Chandler, Akilah. “Interview with New York Art Appraiser”. 5 Oct. 2018.

¹⁹⁵ Chandler, Akilah. “Interview with Laura Doyle, Vice President and Collections Manager of Personal Risk Services at Chubb Insurance.” 6 Nov. 2018.

For example, Joseph Albers's most famous body of work – his 26 year-long project, “Homage to the Square,” is a series comprised of almost 2000 works. In the Albers fashion, the works are symmetrical, defined by clean lines and in quasi-concentric order by proportion and placement. “Every color, every form should speak with its own voice,” Albers explained.¹⁹⁶ It is safe to say this series was intended by the artist to be put on the market for sale and permitted by conservators to ensure every color and form be distinct. Albers study of this series, however, is another matter. The studies are created in the form of rough renditions on board and paper. The lines and colors bleed into each other and are not typical of Albers perfectly lined forms for which he is known. Dealing with these study drawings - works not originally intended for market consumption and arguably for archival purposes, the conservator must weigh this intent with that of a client who wishes for the study drawing to look more like the realized final painting.

5. After the work has been appropriately treated, a Damage and Loss of Value Appraisal must be prepared. The report includes the appraiser's qualifications to assess the work and establishes the purpose of the report.¹⁹⁷ Additional elements include: cause and extent of the damage described ad nauseam, assessment of the restoration treatment, and outlined costs of restoration. The anticipated value of the damaged object should be clearly reported.¹⁹⁸

An appraisal is essentially an opinion of value based on proper identification and valuation within a specific market context and for a particular purpose.¹⁹⁹ It is essential that the appraiser consider the marketplace tolerance for the condition of the work. With

¹⁹⁶ De Kooning, Elaine Nicholas, et al. *Joseph Albers: Midnight and Noon*. David Zwirner Books, 2017.

¹⁹⁷ Cardile, Paul J. “Damage and Loss of Value.” *Appraising Art: The Definitive Guide to Appraising the Fine and Decorative Arts*, by Wendell D. Garrett, Appraisers Association of America, 2013.

¹⁹⁸ *Ibid.*

¹⁹⁹ Willis, Jane H. “Appraising Art.” *The Definitive Guide to Appraising the Fine and Decorative Arts*, by Wendell D. Garrett, Appraisers Association of America, 2013.

contemporary works, damage is considered more severe and can affect value more drastically. Contemporary objects tend to be found in near-perfect condition, so the slightest flaw in them is not as acceptable as flaws in objects that have survived for over a hundred years.²⁰⁰ In the case of an Old Master painting, such an object in a pristine state would demand a premium.²⁰¹ The Old Master market has a relatively high tolerance for damage and repair, so much so, that invisible or nearly invisible repairs are common. Appraising is currently a self-regulated profession with the criteria for designation, education, and standards of excellence largely the purview of the Appraisers Association of America (AAA) and other not-for-profit membership associations. The appraisal is generally considered to be a legal document, one that may be relied upon by the parties for whom it was executed as well as any other intended users.²⁰² A copy of this appraisal should accompany the work and be retained in the owner's records.

6. If the work is beyond repair and ruled a 'total loss,' the insurance company pays out the full value or agreed upon settlement and acquires the work. As stated in the conservation section of Chubb's coverage terms, the conservator's treatment cannot be liable.

Restoration treatments are not included for a payout unless it is in the event of a claim. If for example a painting falls and results in damage, a claim can be filed on the damage, but if any other restoration work is done to it that was not the result of the fall, it will not be covered - this may include adding varnish to make it more aesthetically pleasing.

Other events not covered under Chubb include war-like actions, inherent vices, and gradual deterioration, and infestation. Though there is currently no disavowal clause in Chubb's coverage terms, they treat disavowed works in the same light. Once the artist has

²⁰⁰ Cardile, Paul J. "Damage and Loss of Value." *Appraising Art: The Definitive Guide to Appraising the Fine and Decorative Arts*, by Wendell D. Garrett, Appraisers Association of America, 2013.

²⁰¹ Ibid.

²⁰² Ibid.

disavowed a work, a written statement from the artist is typically required.²⁰³ The work is then rendered a total loss, the full value or agreed upon settlement is paid out, and Chubb acquires the work. Once acquired, they may offer it back to the artist or agent representing the artist. The artist or representing agent must then sign a legal document drafted by Chubb's lawyers agreeing that the returned piece will be used exclusively “for archival reasons” and can’t be sold or transferred.²⁰⁴ Chubb may also choose to donate the work to a conservation school/studio for educational purposes; they too have to sign a legal document stating the donated work will not be sold or transferred.²⁰⁵

While VARA does not specify an artist’s right to prevent harm or disavow a work as a result of ‘physical’ damage, Chubb does. Intent alone has no standing; there must be physical damage.²⁰⁶ Looking at both cases involving Richard Prince’s disavowal, a claim would not be filed with Chubb because there was no physical damage to the work.

7. If a disavowed or “total loss” work is not covered by insurance, the owner should offer the work back to the artist or representing agent of the artist. If this effort is to no avail, the owner may choose to donate the work to an institution for educational purposes. An example is the Salvage Art Institute (SAI). SAI acts as a haven and exhibition space for total loss works and works “removed from art market circulation.”²⁰⁷ They claim stewardship over total loss inventories as they are declared with or without physical transfer and seek to maintain the work’s “right to remain independent from the demands of future marketability.”²⁰⁸ Additionally, owners may choose to sell the total loss work or

²⁰³ Chandler, Akilah. “Interview with Laura Doyle, Vice President and Collections Manager of Personal Risk Services at Chubb Insurance.” 6 Nov. 2018.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ “Krajewska, Elka, “Short History”, *Salvage Art Institute*, salvageartinstitute.org/.

²⁰⁸ Ibid.

disavowed work as salvage art, that is, it is sold as a decorative object on the private market. The reason for the work's status as salvage art must be clearly documented. Specifically, with a disavowed work, it must be accompanied with documents citing it as "former work of [name of artist]" or some mention explicitly stating the work is no longer by the artist.

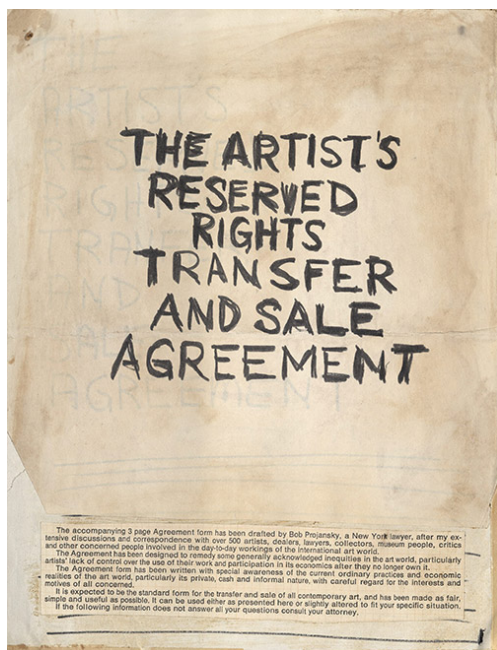
In conversation with Steven Ludmer, Chief Financial Officer of Gloria Velandia Conservation Studio, he revealed that though a work has never been disavowed as a result of the restoration efforts of their conservators, he has had to work with a piece that was disavowed before being brought into the studio. The piece had been incinerated in a fire and subsequently disavowed by the artist. The owner's insurance company ruled it a total loss, but he decided not to have his insurance pay out the full value and acquire it. The work still belongs to the owner and remains in the studio as an experimental project for the conservation studio.

While the suggested practices are great in theory, they in no way exhaust professional counsel, advisory services, or existing codes of conduct. The international art market is over 200 years old, yet the enactment of moral rights in the U.S. has been around for less than 30 years. It is unrealistic to expect a single piece of legislation to right a century's worth of unregulated practices. This excuse however does not absolve the gatekeeping agents of accountability. In all the cases explored in this paper, whether it was before or after the enactment of VARA, there was an underlying theme of conflicting interests and the prevailing interests always being in favor of the powerful gatekeepers while at the expense of the artists' rights. The entities mentioned in this paper, specifically patrons, dealers, art advisors, and auction houses, were held to a standard of care commensurate with the duties considered the norm for that business and

norm for that time. Now, in the 21st century, this is not enough. These entities acting in their ordinary course of business have proven that artists are consistently handed the shorter end of the stick. Artists have served humanity for thousands of years, and it is through them that the world has confronted the many facets of the human condition. Art in all its forms is a universal language that reaches across borders connecting the world. It would only benefit the world and with that, the art market, for each of these powerful entities to prioritize artists' rights above their economic interests. The ramifications of doing otherwise would disenfranchise an already exploited profession and discourage interest in pursuing this profession – a manifestation the world could not bare.

APPENDIX

Figure 1.



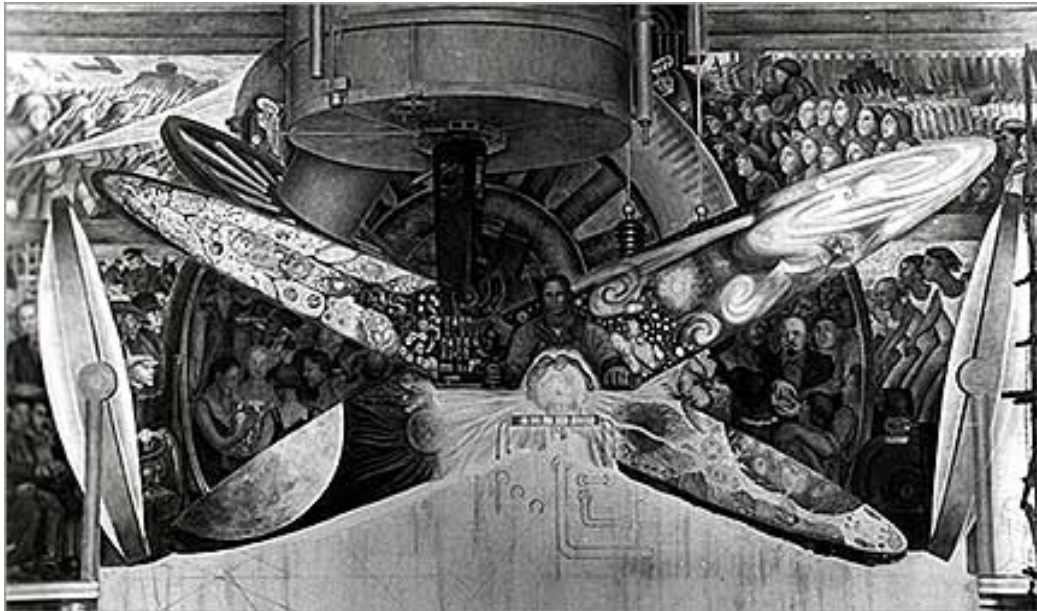
Robert Projansky and Seth Siegelau, Artists Reserved Rights Transfer and Sale Agreement, courtesy II.13 The Museum of Modern Art Archives, New York.

Figure 2.



Diego Rivera, *Man at the Crossroads*, 1932; © 2018 Banco de México Diego Rivera Frida Kahlo Museums Trust, Mexico, D.F. / Artists Rights Society (ARS), New York, <https://www.moma.org/collection/works/34635>

Figure 3.



Diego Rivera, *Man at the Crossroads*, (in progress), mural, Rockefeller Center, New York, 1932-34; The figure of Lenin is visible in the center right. © Banco De Mexico, Diego Rivera and Frida Kahlo Museums Trust, Av. Cinco de Mayo No. 2, Col. Centro, Del. Cuauhtemoc, 06059, Mexico, D.F. Courtesy del Instituto Nacional de Bellas Artes y Literatura, Mexico Photo Courtesy Old Stage Studios, Gualala, CA.

Figure 4.



Diego Rivera, *Man, Controller of the Universe*, recreated version, which is on display at the Palacio de Bellas Artes in Mexico City. Courtesy of www.DiegoRivera.org

Figure 5.



Richard Serra, *Tilted Arc*, 1981; View of Federal Plaza with *Tilted Arc* seen from the side, photograph by Susan Swider, courtesy of artist

Figure 6.



Cady Noland, "Cowboys Milking", 1990, courtesy artnet.com

Figure 7.



Formerly Cady Noland, *Log Cabin* - *DISAVOWED*, 1990, courtesy PACER

Figure 8.



Formerly Cady Noland, *Log Cabin Blank with Screw Eyes and Cafe Door* – *DISAVOWED*, courtesy Stonescape.us.

Figure 9

FROM CADY NOLAND

7/18/14

TO: "MYSTERY CLIENT"
(216) 426-7171

P.S. I SUGGEST YOU NOT TAKE UP ONE MORE MOMENT OF MY TIME, AND THE NEXT TIME AROUND MAN-UP AND CALL THE ARTIST YOURSELF.

THIS IS NOT AN ARTWORK

IF THE 'PREVIOUS OWNER' DID WORK WITH A SO-CALLED 'CONSERVATOR' I CERTAINLY WAS NOT CONSULTED, NOR DID I APPROVE WHATEVER WAS DONE. FROM NOW ON, THE PROVENANCE MUST INCLUDE THE FACT THAT THE PIECE WAS 'REPAIRED' BY A CONSERVATOR BUT THE ARTIST WASN'T CONSULTED. THE CONSERVATOR'S NAME SHOULD BE ON THE PROVENANCE ACCOMPANYING THAT IMPORTANT FACT.

AS ANY REPUTABLE VALUATION EXPERT WLD TELL YOU, THE WORK NEEDS TO BE DEPRECIATED IN VALUE BECAUSE OF THE 'REPAIR' THAT HADNT BEEN OVERSEEN OR AGREED TO BY THE ARTIST. SO, FOR EXAMPLE IF YOU WERE TO GIFT THE WORK TO A MUSEUM THE TAX DEDUCTION SHOULD REFLECT THIS DEPRECIATED AMT. YOU MAY ~~PRODUCE~~ NOT PRODUCE/REPRODUCE PHOTOS TO GO ONLINE OR TO BE PRINTED ~~DOWN~~ DOWN.

Affidavit of Plaintiff, Cady Noland in Opposition to Defendants' Motion to Dismiss. no. 1:17-cv-05452-JPO, (SDNY) 3 Aug. 2018. Exhibit B. https://greg.org/wp-content/uploads/2018/09/noland_log_cabin_artist_affidavit_79B.pdf.

Figure 10.



Ivanka Trump with DISAVOWED Richard Prince portrait, courtesy @ivankatrump/Instagram)

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